No. 3098

United States
Circuit Court of Appeals
For the Ninth Circuit.

R. R. SIDEBOTHAM and J. G. G. WILMOT,
Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

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BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

As originally drawn, the indictment in this case contained eleven counts.

The first ten counts charged the devising of a scheme and artifice to defraud and for obtaining money and other property by means of false and fraudulent pretenses, representations and promises, under Section 215 of the Penal Code, in connection with the sale and disposition of stock of the Northwestern Trustee Company, a Montana corporation.

The eleventh count charges a conspiracy to commit an offense against the United States un-

der Section 37 of that Code, in that the defendants conspired to devise a scheme and artifice to defraud and for obtaining money and other property by means of false and fraudulent pretenses, representations and promises in connection with the sale of the Capital Stock of said company, contrary to the provisions of Section 215 of the Penal Code.

The case was submitted to the jury upon the sixth, seventh, eighth, ninth and eleventh counts of the indictment.

ARGUMENT.

I.

Plaintiffs in Error contend that the Court erred in denying a motion to require the Government to elect whether it would seek a conviction on the eleventh count of the indictment, or the remaining counts thereof.

This contention is disposed of adversely to Plaintiffs in Error by express statutory provision.

Section 1024 of the Revised Statutes of the United States (Section 1690, United States Compiled Statutes, 1916) provides as follows:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment

in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

All the charges contained in the indictment related to the same transaction, were connected together, were of the same class of offenses, and the evidence offered to sustain one count was also admissible and relative to the other counts of the indictment.

The same were properly joined in the same indictment:

Rooney vs. United States, 203 Fed., (C. C. A., Ninth Circuit) 928-930;
Glass vs. United States, 222 Fed., (C. C. A., Ninth Circuit) 773-780;
Pointer vs. United States, 151 U. S., 396. 38 L. Ed. 208-214;
McGregor vs. United States, 134 Fed., 187-194. 69 C. C. A., 477-484;
Dolan vs. United States, 133 Fed., 440-446. 69 C. C. A., 274-280;

Requiring an election is largely within the discretion of the trial court. The trial judge gets nearer to the case than judges of the appellate court can get. He is in a better position to judge of the sound exercise of this discretion than the appellate court can ordinarily reach. His exercise of this discretion should not be disturbed, unless it is clear that it was improvidently exercised.

Gardes v. United States, 87 Fed., 172, 176:
Certiorari denied, 171 U. S., 689, 43 L. Ed. 1179;

Rooney v. United States, 203 Fed., (C. C. A., Ninth Circuit) 928, 930-31;
Dolan v. United States, 133 Fed., 440, 446;
Pointer v. United States, 151 U. S., 396, 38 L. Ed. 208, 211;

It has repeatedly been held that a count charging a conspiracy under Section 37 of the Penal Code may properly be joined in the same indictment with counts charging a violation of other provisions of that code:

Gregory v. United States, 134 Fed., 187, 194;
Wallace v. United States, 243 Fed., 302, 305;
United States v. Clark, 125 Fed., 92, 94;

The cases cited by Plaintiffs in Error do not bear out their contention.

In the case of Pointer v. United States, (151 U. S., 396, 38 L. Ed., 208) the indictment contained four counts. In the first count it was charged that the defendant, on the 25th of December, 1891, at the Choctaw Nation, in the Indian county within the above district, did, with an axe, feloniously, willfully, and of his malice aforethought, "strike, cut, penetrate, and wound" upon the head of one Samuel E. Vandiveer, a white man and not an Indian, inflicting thereby a mortal wound from which death instantly ensued. The second count charged the same offense, and differed from the first only in using the words "beat, bruise," in place of "cut, penetrate."

In the third count the defendant was charged,

in the words of the first count, with having, in the same manner, on the 25th day of December, 1891, feloniously, willfully, and of his malice aforethought, at the Choctaw Nation, in the Indian country, within the same district, killed and murdered one William D. Bolding, a white man and not an Indian. The fourth count differed from the third only as the second count differed from the first.

The defendant pleaded not guilty and later moved to quash the indictment upon various grounds, one of which was that it charged two distinct felonies. That motion was overruled.

Before the case was opened to the jury for the government, the defendant moved that the District Attorney be required to elect on which count of the indictment he would claim a conviction. That motion having been overruled, he was required to go to trial upon all the counts.

Upon the conclusion of the evidence, the defendant renewed the motion that the government be required to elect upon which count of the indictment it would prosecute him. This motion was overruled.

After an elaborate charge by the court, the jury retired to consider their verdict and returned into court the following:

> "We, the jury, find the defendant, John Pointer, guilty of murder as charged in the first count of the indictment.
>
> F. M. BARRICK,
> Foreman."

"We, the jury, find the defendant, John Pointer, guilty of murder as charged in the third count of the indictment.

F. M. BARRICK,
Foreman."

A motion for a new trial was made and overruled, and the court sentenced the defendant to suffer the punishment of death.

On appeal the Supreme court held that the action of the trial court was proper and the judgment was affirmed.

The ruling in this case is directly opposed to the view contended for by Plaintiffs in Error.

In the case of McElroy v. United States, 164 U. S., 76, 41 L. Ed., 355, cited by Plaintiffs in Error, George McElroy, John C. W. Bland, Henry Hook, Charles Hook, Thomas Stufflebeam, and Joe Jennings were indicted in the circuit court for the western district of Arkansas for assault with intent to kill Elizabeth Miller, April 16, 1894, the indictment being numbered 5332; also for assault with intent to kill Sherman Miller, on the same day, the indictment being numbered 5333; also for arson of the dwelling house of one Eugene Miller, May 1, 1894, the indictment being numbered 5334. Three of these defendants, namely, George McElroy, John C. W. Bland, and Henry Hook, were also indicted for the arson of the dwelling house of one Bruce Miller, April 16, 1894, the indictment being numbered 4843. It does not appear that Jennings was tried. The court ordered the four indictments consolidated

for trial, to which each of the five defendants duly excepted. Trial was then had and resulted in separate verdicts finding the defendants guilty, and, after the overruling of motions for new trial and in arrest, they were severally sentenced on each indictment to separate and successive terms in the penitentiary, and sued out a writ of error.

The question before the appellate court was, whether counts against five defendants can be coupled with a count against part of them, for offenses charged to have been committed by all at one time can be joined with another and distinct offense committed by part of them at a different time.

The record disclosed that there was no evidence offered tending to show that there had been or was a conspiracy between the defendants, or them and other parties, to commit the alleged crimes.

The court held that the statute did not authorize the joinder of distinct felonies not provable by the same evidence and in no sense resulting from the same series of acts.

This case is not in point under the facts disclosed by the record in the case at bar.

The motion to require the government to elect whether it would seek a conviction on the eleventh count, or the remaining counts of the indictment was properly denied.

II.

The motion for a directed verdict was properly denied.

It appears from the record that Miss Hosking was employed by the Plaintiffs in Error from November 7, 1913, until April 1, 1916, and that the offices of Sidebotham and Wilmot and the Northwestern Trustee Company were together, (Tr. Pages 209 and 210).

That the exhibits complained of (Exhibits Nos. 98 and 99) were sent out to the stockholders in and subscribers for stock of the Northwestern Trustee Company, through the United States Mail, inclosed in Exhibit 97, (Tr. page 609).

And that Exhibits 97, 98 and 99 were sent out through the United States mail by Miss Hosking, acting under the instruction of the Plaintiffs in Error (Tr. Pages 332 and 333).

The requirements of the statute were fully met:

Section 215, Penal Code;
Rumble v. United States, 143 Fed., (C. C. A., Ninth Circuit) 772, 782.

III.

The testimony of Mrs. DeCelles was properly admitted.

Henry A. Meyer was one of the defendants, (Tr. Page 1).

He was one of the Directors of the Northwestern Trustee Company and his name was used as such in the printed matter sent out by the Plaintiffs in Error, (Tr. Pages 163, 214, 334, 351).

He had an option upon a portion of the Capital Stock of the Northwestern Trustee Company, (Tr. Pages 149, 157, 161, 162).

He was operating with the Plaintiffs in Error in connection with the affairs of the Northwestern Trustee Company, at the time he dealt with Mrs. DeCelles, (Tr. Pages 289, 292, 295, 341).

He received a commission from the Plaintiffs in Error on all stock in the Northwestern Trustee Company sold by him (Tr. Pages 341 and 342).

Shortly after Mrs. DeCelles had purchased stock in the Northwestern Trustee Company the Plaintiffs in Error called upon her in an attempt to sell her more stock in the Company, and made practically the same statements that had been made by Mr. Meyer, and thereafter many communications, in some of which the name of Henry A. Meyer appeared as one of the Directors of the Northwestern Trustee Company, were sent to her in an effort to induce her to buy more stock (Tr. Pages 237-277).

And shortly after Mrs. DeCelles had purchased stock in the Northwestern Trustee Company from Henry A. Meyer, R. R. Sidebotham, one of the Plaintiffs in Error, called upon her and in referring to the sale of stock in said Company made to her by Mr. Meyer, said "it was allright" (Tr. Pages 281-282).

This testimony was merely one of many matters tending to throw light upon the operations of the Plaintiffs in Error and the other defendants

in connection with the matters charged in the indictment. The ruling of the Court was right.

IV.

Exhibits 151 and 152 (Tr. Page 426) were properly admitted in evidence.

Plaintiffs in Error left these exhibits lying on the desk of B. F. Johnson at his home near Warm Springs, Montana, (Tr. Pages 424, 426).

The facts do not warrant the contention made by the Plaintiffs in Error in this connection.

If possession of these Exhibits had been wrongfully obtained, no error in law was committed:

Lyman v. United States, 241 Fed., (C. C. A., Ninth Circuit) 945, 948.

Nor was there any error in the admission of Exhibit 31, (Tr. Pages 330 and 331) in evidence.

This Exhibit was dictated by R. R. Sidebotham, one of the Plaintiffs in Error, to Miss Hosking who wrote it out on the typewriter and signed the same at Mr. Sidebotham's suggestion (Tr. Page 212).

V.

There was no error in the instruction of the court.

The statement appearing on Page 648 of the transcript and commented on at Page 35 of the Brief for Plaintiffs in Error did not call the attention of the jury to the fact that Plaintiffs in Error did not testify in their own behalf.

Considered as a whole it is merely the statement of a truism.

If this statement called the fact that the Plaintiffs in Error did not testify in their own behalf to the attention of the jury, the Plaintiffs in Error are not now in a position to ask this Court to consider it.

The only objection to the charge of the Court appears at Pages 689 and 690 of the Transcript.

No objection to this part of the charge was made or exception taken by anyone.

The question will not now be considered:

York v. United States, 241 Fed., (C. C. A., Ninth Circuit) 956, 957.

R. R. Sidebotham, one of the Plaintiffs in Error, did not object or except to that portion of the Court's charge, found at Page 678 of the Transcript and commented on at Page 36 of the Brief for Plaintiffs in Error.

He is not now in a position to ask that a new trial be granted on account of this portion of the Court's charge to the jury. Considered as a whole, the charge of the Court did not call the attention of the jury to the fact that the Plaintiffs in error had not testified in the case.

It will also be observed that the objection made, (Tr. Page 689) did not call the attention of the trial court to the particular portion of the charge to which objection was made.

The Judgment of the District Court should be affirmed.

Respectfully submitted,
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